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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

UNITED FOOD & COMMERCIAL  
WORKERS LOCAL 99; et.al.,

Plaintiffs,

-and-

Arizona Education Association, et.al.,

v.

Ken Bennett, in his capacity as Secretary of  
the State of Arizona; et.al.,

Defendants.

CASE NO. 2:11-cv-921-PHX-GMS

**PLAINTIFFS' REPLY TO  
DEFENDANT'S RESPONSE TO  
MOTION FOR SUMMARY  
JUDGMENT RE SB 1365**

For their reply, Plaintiffs urge two points. First, as to whether this Court should rule on Plaintiffs' federal labor law preemption claim, Defendants' reliance on the prudential concern for avoiding resolution of substantive constitutional issues is entirely misplaced. Such authority

1 actually calls for this Court to first consider the preemption argument because it is primarily  
 2 statutory in nature. Second, Defendant has failed to offer any cognizable reason for this Court to  
 3 ignore *SeaPAK v. Industrial Technical & Professional Employees*, 300 F. Supp. 1197, 1200  
 4 (S.D. Ga. 1969) aff'd 423 F. 2d 1229 (5th Cir. 1970) aff'd 400 U.S. 985 (1971).

5 **I. As Plaintiffs' Preemption Claim Is Primarily Statutory in Nature, Prudential**  
 6 **Concerns Call For this Court To Resolve that Question.**

7 Defendant has not challenged any of the several prudential reasons advanced by Plaintiffs  
 8 as to why this Court should rule on the federal labor law preemption issue. Doc. No. 158, p 1 –  
 9 9. Specifically, Defendant has not contested the federal labor law preemption claim is properly  
 10 before this Court and will remain so even if the Court determines SB 1365 violates the First  
 11 Amendment. Nor has Defendant disputed the question of the State's authority to regulate private  
 12 sector dues checkoff is a threshold issue logically preceding examination of whether SB 1365  
 13 also violates the First Amendment. Finally, Defendant does not contest the beneficial practical  
 14 impacts of a ruling on the preemption issue. Such ruling likely will serve to eliminate Plaintiffs'  
 15 need to participate in the appeal process; will preclude potential state law actions attempting to  
 16 enforce SB 1365 in the private sector; and will preserve the stability of the private sector system  
 17 by assuring participating employers the cost- efficient federal statutory scheme is not subject to  
 18 additional burdens imposed by state regulation.

19 Instead, in its response, Defendant cursorily asserts this Court should abstain from ruling  
 20 on the federal preemption issue based on the prudential doctrine instructing a district court to  
 21 resolve a case on a statutory basis and avoid unnecessarily reaching substantive constitutional  
 22 concerns. Doc. No. 180, p 2,3; See, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936)  
 23 (Brandeis, J., concurring) ("The Court will not formulate a rule of constitutional law broader  
 24 than is required by the precise facts to which it is to be applied.") As discussed below, closer  
 25 examination of the *Ashwander* line of cases reflects application of this prudential doctrine if  
 26 appropriate under the instant circumstances produces the opposite result. To avoid "unnecessary  
 27  
 28

and broad adjudication of constitutional issues”, this Court should resolve nearly all of Plaintiffs’ case by first deciding the preemption question.<sup>1</sup>

The fatal flaw in Defendant’s argument is its bare assumption that prudential concern for avoiding unnecessary constitutional adjudication equates preemption claims with a substantive constitutional claim. With no exceptions revealed by Plaintiffs’ research, courts routinely have rejected that argument.<sup>2</sup> To the contrary, Plaintiffs’ preemption claim does not call for this Court to resolve a substantive constitutional issue. See, *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) (Supremacy Clause is not a source of substantive rights; it simply serves as a trumping principle that enforces existing federal rights whenever there is a

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<sup>1</sup> Admittedly a handful of UFCW’s members are not NLRA-covered and accordingly the First Amendment issues would remain for them (as well as for the public-sector Intervenor and their members) unless non-NLRA applications cannot be severed. However, the severability analysis changes significantly if well over half of potentially-covered workplaces are excluded from SB 1365 due to NLRA preemption. See GAO Report No. 02-835 “Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights” (Sept. 2002)(noting that of 135 million people in American workforce, 115 million were in private sector and 78% covered by NLRA, whereas only 20 million are in public sector and there bargaining rights cover smaller percentage of workforce)(available at [www.gao.gov/new.items/d02835.pdf](http://www.gao.gov/new.items/d02835.pdf)).

<sup>2</sup> *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965) (While preemption claims are “of course grounded in the Supremacy Clause of the Constitution,” the “basic question” involved in such cases “is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes.”); *Hotel Emples. & Rest. Emples. Int’l Union v. Nev. Gaming Comm’n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (“A preemption claim alleges in essence that Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions.”); *Knudsen Corp. v. Nevada State Dairy Com.*, 676 F.2d 374, 377 (9th Cir. 1982)(“Although preemption has its doctrinal base in the Constitution, the question is largely one of determining the compatibility of a state and a federal statutory scheme. No constitutional issues of substance are presented.”); *Fleet Bank, N.A. v. Burke*, 160 F.3d 883, 890 (2d Cir. 1998)(“[P]reemption claims, though implicating the Supremacy Clause, have been recognized as presenting a constitutional issue of a lesser magnitude than suits challenging the authority of state officials on the ground that their actions will violate the substantive limitations of the Constitution.”); *N.J. Payphone Ass’n v. Town of W. N.Y.*, 299 F.3d 235, 239 (3d Cir. 2002)( “[F]ederal preemption is generally an issue requiring the determination of congressional intent rather than resolving a constitutional problem of substance. . . . For this reason, preemption questions are “treated as ‘statutory’ for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications.”)

1 conflict with state or local law). Instead, resolution of the preemption claim requires only an  
2 interpretation of SB 1365 in light of the comprehensive federal labor law scheme.

3 Accordingly, on at least three occasions, the Supreme Court has determined "although [a  
4 preemption] claim is basically constitutional in nature, deriving its force from the operation of  
5 the Supremacy Clause, it is treated as 'statutory' for purposes of . . . deciding statutory claims  
6 first to avoid unnecessary constitutional adjudications. " *Douglas v. Seacoast Products, Inc.*,  
7 431 U.S. 265, 272 (1977). There, the plaintiff challenged Virginia statutes limiting the right of  
8 nonresidents and aliens to catch fish in its territorial waters under both the Supremacy Clause  
9 and substantive provisions of the Constitution. The Court ruled: "Since we decide the case on  
10 [preemption], we do not reach the constitutional issues [Commerce Clause and the Equal  
11 Protection Clause] raised by the parties." *Id.*

12 The Court's *per curiam* decision in *Philadelphia v. New Jersey*, 430 U.S. 141 (1977)  
13 turned on the same prudential doctrine. A New Jersey state court had rejected challenges to a  
14 New Jersey environmental statute under both the Supremacy Clause and the Interstate  
15 Commerce Clause. After the U.S. Supreme Court noted probable jurisdiction, a new federal  
16 environmental statute went into law. Noting the primacy of the Supremacy Clause claim, the  
17 Supreme Court remanded the case so the New Jersey court could address whether the new  
18 federal statute preempted the New Jersey statute. The Supreme Court explained:

19 While federal pre-emption of state statutes is, of course, ultimately a  
20 question under the Supremacy Clause, . . . analysis of pre-emption  
21 issues depends primarily on statutory and not constitutional  
22 interpretation. *Therefore, it is appropriate that the federal*  
23 *preemption issue be resolved before the constitutional issue of*  
*alleged discrimination against or undue burden on interstate*  
*commerce is addressed.*

24 *Id.* at 142 (emphasis supplied).

25 In *Blum v. Bacon*, 457 U.S. 132 (1982), the Supreme Court again relied on the principle  
26 that preemption claims present statutory interpretation claims and should be resolved before  
27 substantive Constitutional law claims. The plaintiffs challenged New York state rules governing  
28

a public assistance program on both preemption and substantive Constitutional grounds. The Court ruled only on the preemption claim and explained:

Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue. See *Califano v. Yamasaki*, 442 U.S. 682, 692-693 (1979); *Hagans v. Lavine*, 415 U.S. 528, 543 (1974).<sup>5</sup> We conclude that this case may be resolved on statutory grounds. As we explain below, the New York . . . conflict with valid federal regulations promulgated by the Secretary . . . Thus, New York's rules are invalid under the Supremacy Clause.

*Id.* at 137-138 (1982).

Here, adjudication of the First Amendment claims is perhaps necessary given the presence of public-sector Interveners. However, the likely ruling that SB 1365 violates the First Amendment should not serve to preclude resolution of whether SB 1365 is preempted. The preemption issue is properly before this Court. Doc. No. 158, p 5 - 6. A ruling on the First Amendment claims will not render the preemption claim moot or otherwise call for this Court to issue an advisory decision. Doc. No. 158, p 6 – 8. Nor, as urged above, will resolution of the preemption question constitute unnecessary adjudication of substantive constitutional claims. Instead, a ruling on the preemption question will help preserve the long-term stability of Congress' comprehensive regulatory scheme. Doc. No. 158, p 8 – 10. This is a matter of vital interest to Plaintiffs and the employer community, one for which they respectfully submit they have a right to a “just, speedy and inexpensive determination.” Rule 1, Fed. R. Civ. Proc.

## **II. Defendant's Attempts to Distinguish *SeaPak* are Frivolous.**

Defendant's claim that “*SeaPak* is not the law of the land” would have this Court turn a blind eye to both the *SeaPak* decision and an unbroken chain of case law holding states are preempted from regulating private sector dues checkoff. Rather than contest that *SeaPak* rests on the conclusion that 29 U.S.C. § 186 (c)(4) preempts the field, Defendant relies on *Fusari v. Steinberg*, 419 U.S. 379 (1975) and *Mandel v. Bradley*, 432 U.S. 173 (1977) to argue *SeaPak* is not binding precedent, just a 50- year- old “unpersuasive” district court decision. However, as every case resolving the issue both before and after the issuance of *SeaPak* holds federal labor



laws preempt state regulation of private sector dues checkoff, there is no reasoned basis to doubt *SeaPak*'s continued viability. See, Doc. No. 173, p 10 -14, n. 2 and 3.

The Supreme Court's summary affirmance binds lower courts, unless subsequent developments suggest otherwise. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *United States v. Blaine County*, 363 F.3d 897, 904 (9th Cir. 2004)(While "Supreme Court is more willing to reconsider its own summary dispositions than it is to revisit its prior opinions, this principle does not release the lower courts from the binding effect of summary affirmances.") *Fusari* only cautions against reading a summary affirmance as "as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Id.* at 391-92. *Mandel* makes even more explicit the point by instructing:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. *They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.*

*Id.* at 176 (emphasis supplied).

Defendant's claim that *SeaPak* is unpersuasive warrants little attention. Defendant correctly notes that *SeaPak* was decided some 50 years ago, but fails to offer a single case even suggesting there is room to debate continued its continued viability. *United States v. Locke*, 529 U.S. 89, 108 (2000)(Skepticism appropriate when state attempts to regulate area with history of significant federal presence.) Defendant's prior argument that *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988) represents a doctrinal shift in LMRA preemption warranting reconsideration of *SeaPak* was particularly weak. See, Doc. No. 173, p 10 – 14.

Even if the Court were somehow to not find field preemption, the question remains whether SB 1365 impermissibly conflicts with 29 U.S.C. § 186 (c)(4). Defendant's only attempt to reconcile the requirements of SB 1365 with 29 U.S.C. § 186 (c)(4) is its contention that the federal statute "does not require that check-off authorization be irrevocable". This comment is literally true, but entirely misses the point. Congress in 29 U.S.C. § 186 (c)(4) could have required annual opt-in or left the issue to the States (as it did with "right to work", 29 U.S.C. §

### III. Conclusion

Respectfully submitted this 24<sup>th</sup> day of September 2012.

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**Certificate of Mailing**

I hereby certify that on the 24<sup>th</sup> day of September 2012, I electronically transmitted the foregoing to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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